

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION**

JASON ALFORD, DANIEL LOPER, WILLIS MCGAHEE, MICHAEL MCKENZIE, JAMIZE OLAWALE, ALEX PARSONS, ERIC SMITH, CHARLES SIMS, JOEY THOMAS, and LANCE ZENO, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

THE NFL PLAYER DISABILITY & SURVIVOR BENEFIT PLAN; THE NFL PLAYER DISABILITY & NEUROCOGNITIVE BENEFIT PLAN; THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN; THE DISABILITY BOARD OF THE NFL PLAYER DISABILITY & NEUROCOGNITIVE BENEFIT PLAN; LARRY FERAZANI; JACOB FRANK; BELINDA LERNER; SAM MCCULLUM; ROBERT SMITH; HOBY BRENNER; and ROGER GOODELL,

Defendants.

Case No. 1:23-cv-00358-JRR

**PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY
IN FURTHER OPPOSITON TO DEFENDANTS' JOINT RULE 12(b)(6)
MOTION TO DISMISS PLAINTIFFS' AMENDED CLASS ACTION COMPLAINT**

Plaintiffs respectfully submit this Notice of Supplemental Authority in further opposition to Defendants' joint Rule 12(b)(6) motion (ECF No. 69) to dismiss Plaintiffs' amended class action complaint (ECF No. 56). Specifically, Plaintiffs wish to bring to the Court's attention the Fifth Circuit's October 6, 2023 decision in *Cloud v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, ___ F. 4th ___, No. 22-10710, 2023 WL 6533182 (5th Cir. Oct. 6, 2023).

As the Court is no doubt aware, the district court's decision in *Cloud v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. 3:20-CV-1277, 2022 WL 2237451 (N.D. Tex. June 21, 2022) was cited extensively in Plaintiffs' memorandum of law in opposition to Defendants' motion. *See* Pls.' Mem. of Law in Opp. to Defs.' Joint Rule 12(b)(6) Mot. to Dismiss Pls.' Am. Class Action Compl. (ECF No. 70) at 1-2, 4, 14, 22, 24, 26, 54. Moreover, in arguing that Plaintiffs failed to plausibly state a claim, Defendants collaterally attacked certain of the district court's findings. *See* Mem. in Support of Defs.' Joint Rule 12(b)(6) Mot. to Dismiss (ECF No. 69-1) at 31, 33.

In its October 6, 2023 opinion, the Fifth Circuit reversed the district court's decision. It did so, however, on the narrow ground that plaintiff Cloud had failed to satisfy the Plan's "changed circumstances" standard—a standard that "has no set definition and is constantly evolving," with the district court having "identified at least eight variations of the definition"—so as to warrant reclassification to the Active Football Total & Permanent Disability benefit category. *Cloud*, 2023 WL 6533182, at *6-8 (internal quotation marks omitted).

Notably, as is relevant to Defendants' implausibility arguments here, the Fifth Circuit acknowledged the district court's "thorough findings—devastating in detail—which expose the NFL Plan's disturbing lack of safeguards to ensure fair and meaningful review of disability claims brought by former players who suffered incapacitating on-the-field injuries, including severe head trauma." *Id.* at *1. It also noted that "[t]he record paint[ed] a bleak picture of how the Board handles appeals." *Id.* at *3. The Fifth Circuit added that "[t]he district court's findings about the NFL Plan's disregard of players' rights under ERISA and the Plan [we]re disturbing," revealing "a lopsided system aggressively stacked against disabled players." *Id.* at *8.

The Fifth Circuit's *Cloud* decision is attached as **Exhibit A** hereto.

Dated: October 13, 2023

Respectfully submitted,

MIGLIACCIO & RATHOD LLP

By: /s/ Jason S. Rathod
Jason S. Rathod
Nicholas A. Migliaccio
412 H Street, N.E.
Washington, DC 20002
Telephone: (202) 470-3520
Facsimile: (202) 800-2730
jrathod@classlawdc.com
nmigliaccio@classlawdc.com

Christopher A. Seeger (*admitted pro hac vice*)

Diogenes P. Kekatos (*admitted pro hac vice*)

SEEGER WEISS LLP

55 Challenger Road, 6th Floor

Ridgefield Park, NJ 07660

Telephone: (973) 639-9100

cseeger@seegerweiss.com

dkekatos@seegerweiss.com

Samuel L. Katz (*admitted pro hac vice*)

Julia M. Damron (*admitted pro hac vice*)

ATHLAW LLP

8383 Wilshire Blvd., Suite 800

Beverly Hills, CA 90211

Telephone: (818) 454-3652

samkatz@athlawllp.com

julia@athlawllp.com

Bryan F. Aylstock (*admitted pro hac vice*)

Justin G. Witkin (*admitted pro hac vice*)

Douglass A. Kreis (*admitted pro hac vice*)

D. Nicole Guntner (*admitted pro hac vice*)

AYLSTOCK, WITKIN, KREIS, & OVERHOLTZ, PLLC

17 E. Main Street, Suite 200

Pensacola, FL 32502

Telephone: (850) 202-1010

BAylstock@awkolaw.com

JWitkin@awkolaw.com

DKreis@awkolaw.com

NGuntner@awkolaw.com

Robert K. Scott (*admitted pro hac vice*)
Gerry H. Goldsholle (*admitted pro hac vice*)
ADVOCATE LAW GROUP P.C.
2330 Marinship Way, Suite 260
Sausalito, CA 94965
Telephone: (949) 753-4950
bob@advocatelawgroup.com
gerry@advocatelawgroup.com